

In the Matter of the
2021 Redistricting Plan.

**MOTION FOR STAY OF SUPERIOR COURT ORDER REQUIRING
PRODUCTION OF ATTORNEY-CLIENT COMMUNICATIONS**

An immediate stay is warranted here for all of the reasons discussed in the Board’s Petition for Review filed herewith, but most pointedly because once the finder of fact—who will determine the legality of the Board’s legislative reapportionment plan—sees the Board’s confidential attorney-client communications, it cannot unsee them. Further, the negative ramifications of the superior court’s order on the Board, specifically, and the Alaskan public, generally, cannot be understated. Like all courts, this Court has recognized the public benefit derived from a government entity having access to the same confidential attorney-client communications that private citizens

SCHWABE, WILLIAMSON & WYATT, P.C.
420 L Street, Suite 400
Anchorage, AK 99501
Telephone: (907) 339-7125

1 enjoy.² The superior court’s order, if not reversed by this Court, will profoundly alter
2 the Board’s ability to use counsel in the future, and will have a ripple effect on public
3 entities throughout Alaska’s ability to seek confidential legal advice.
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5 The superior court’s Order is based on a misreading and breathtaking expansion
6 of the decision in *Cool Homes, Inc. v. Fairbanks North Star Borough*.³ Nothing in that
7 case abrogates a public entity’s right to confidential attorney-client communications
8 outside of meetings. Nothing in that case morphs the specific statutory remedy
9 contemplated by Alaska’s Open Meetings Act, AS 44.62.310(f)—voiding of the action
10 taken in violation of the Act—into a provision to disclose attorney-client
11 communications.
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13 The superior court’s order contains a significant error of law that would
14 constitute a sea change in the application of the attorney-client privilege for public-
15 entity clients. Specifically, the trial court held at Page 14 of the Order that “discussions
16 of general principles of law applying to the redistricting process are not privileged.”
17 The superior court seems to be holding that the Open Meetings Act limits the content
18 of attorney-client communications sent between attorney and client when not in a public
19 meeting. It appears that the superior court believes confidential written advice, not
20 provided during an executive session, is somehow not subject to attorney-client
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25 ² *Griswold v. Homer City Council*, 428 P.3d 180, 187-89 (Alaska 2018).

26 ³ *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993).

1 privilege, and that this is because the Open Meetings Act limits what can be discussed
2 during an executive session. Public entity lawyers provide confidential advice on a
3 daily basis about general principles of law. Nothing in *Cool Homes* mentions or
4 discusses waiver of privilege. Rather, *Cool Homes* stands for the proposition that use
5 of executive session to discuss only general principles of law would violate the Open
6 Meetings Act. The remedy for an Open Meetings Act violation is set forth in the Open
7 Meetings Act, and it is not a waiver of privilege.
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10 Without a stay, the superior court will conduct an *in camera* review and then
11 release to opposing parties confidential attorney-client communications if the superior
12 court finds that the communications involve general principles of law. The superior
13 court's order strikes to the heart of how counsel and client interact, and raises such
14 fundamental issues for the operation of future Alaska Redistricting Boards that this
15 Board is compelled to seek immediate review by the Alaska Supreme Court. Because
16 the Supreme Court cannot later unring the bell once the superior court invades the
17 attorney-client privilege, review now is essential. For the foregoing reasons, the Board
18 respectfully requests that this Court order that the superior court's January 18 Order is
19 stayed pending decision on the Board's emergency petition for review. The Board has
20 made the same request of the superior court and that motion for stay is pending decision.
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1 DATED at Anchorage, Alaska, this 18th day of January, 2022.

2 SCHWABE, WILLIAMSON & WYATT, P.C.
3 Attorneys for Alaska Redistricting Board

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5 By: 
6 Matthew Singer, ABA No. 9911072
7 Email: msinger@schwabe.com
8 Lee C. Baxter, ABA No. 1510085
9 Email: lbaxter@schwabe.com
10 Kayla J. F. Tanner, ABA No. 2010092
11 Email: ktanner@schwabe.com
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